A

Zurich General Insurance Malaysia Bhd v Lailin Sinin (as administrator for the estate of Ronny Emanuel Rabinus, deceased) & Anor and another suit

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS WA-24NCC-837–08 OF 2022 AND WA-24NCC-917–09 OF 2022
WAN MUHAMMAD AMIN J
C 6 FEBRUARY 2024

Insurance Law — Motor Insurance — Enforceability of insurance policy — Accident occurred at military camp — Whether military camp fell under definition of 'road' pursuant to s 2 of Road Transport Act 1987 ('RTA') read together with s 91(1)(b) of RTA — Whether military camp open to public or to which public had access — Whether military camp connected from one place to another — Whether insurance coverage could apply

D

E The plaintiff in in a suit ('Suit 837') issued a motor insurance policy ('Policy 272') in respect of a motorcycle ('motorcycle SYJ') to Ronny Emanuel Rabinus (deceased) ('Ronny') (substituted by the administrator of his estate, his mother, Lailin Sinin). The plaintiff also in another suit ('Suit 917') issued a motor insurance policy ('Policy 112') in respect of a motorcycle ('motorcycle CCP') to
F Nor Hasimah. An accident occurred at Jalan Utama, Kem Syed Sirajuddin, Gemas, Negeri Sembilan ('Kem Syed Sirajuddin'), involving motorcycle SYJ ridden by Ronny and motorcycle CCP which was ridden by one Rauf ('the accident'). Section 96(2) of the Road Transport Act 1987 ('RTA') notice was subsequently issued by Lailin's solicitors to the plaintiff in Suit 837 and
G similarly a s 96(2) of the RTA notice was issued by Rauf's solicitors to the plaintiff in Suit 917. An investigation was then carried out by the plaintiffs' appointed adjustors and following the said investigation, the plaintiffs' concluded that as the accident occurred in Kem Syed Sirajuddin was an army camp area, it was thus not a public road or a road to which the public had access
H as stipulated under ss 2 and 91(1)(b) of the RTA. The plaintiff in both suits, therefore, applied for a declaration in respect of the enforceability of two insurance policies under s 96(3) of the RTA. The issue that arose for determination was whether the accident occurred on a 'road' (or 'public road') as defined by the RTA as required under the respective policies for the
I insurance coverage to apply.

Held:

(1) Kem Syed Sirajuddin, being an army camp, was a restricted area and as such did not fulfil the 'public access' criteria to fall within the definition

of 'road' under the s 2 of the RTA read together with s 91(1)(b) of the RTA and the policies. On this ground alone suits 837 and 917 could be allowed. Also Kemp Syed Sirajuddin lacked the essential characteristic of a 'road' within the meaning of s 2 of the RTA as it did not connect from one place to another. As an army camp, Kem Syed Sirajuddin would have physical boundaries and any road within it could not be said to connect two or more places which the general public would have access to. In the circumstances, Suits 837 and 917 was allowed (see paras 50–52).

[Bahasa Malaysia summary

Plaintif dalam saman ('Saman 837') mengeluarkan polisi insurans motor ('Polisi 272') berkenaan dengan sebuah motosikal ('motosikal SYJ') kepada Ronny Emanuel Rabinus (si mati) ('Ronny') (digantikan oleh pentadbir harta pusakanya, ibunya, Lailin Sinin). Plaintif juga dalam saman lain ('Saman 917') mengeluarkan polisi insurans motor ('Polisi 112') berkenaan dengan sebuah motosikal ('motosikal CCP') kepada Nor Hasimah. Satu kemalangan berlaku di Jalan Utama, Kem Syed Sirajuddin, Gemas, Negeri Sembilan ('Kem Syed Sirajuddin'), melibatkan motosikal SYJ yang ditunggang Ronny dan motosikal CCP yang dinaiki seorang Rauf ('kemalangan itu'). Notis s 96(2) Akta Pengangkutan Jalan 1987 ('APJ') kemudiannya dikeluarkan oleh peguamcara Lailin kepada plaintif dalam Saman 837 dan begitu juga s 96(2) notis APJ telah dikeluarkan oleh peguamcara Rauf kepada plaintif dalam Saman 917. Siasatan kemudiannya telah dijalankan oleh peguamcara yang dilantik plaintif dan berikutan siasatan itu, plaintif membuat kesimpulan bahawa oleh kerana kemalangan yang berlaku di Kem Syed Sirajuddin adalah kawasan kem tentera, maka ia bukanlah jalan awam atau jalan yang boleh dilalui orang ramai seperti yang ditetapkan di bawah ss 2 dan 91(1)(b) APJ. Oleh itu, plaintif dalam kedua-dua guaman itu, memohon pengisytiharan berkenaan dengan kebolehkuatkuasaan dua polisi insurans di bawah s 96(3) APJ. Isu yang timbul untuk penentuan adalah sama ada kemalangan itu berlaku di 'jalan raya' (atau 'jalan awam') seperti yang ditakrifkan oleh APJ seperti yang dikehendaki di bawah polisi masing-masing untuk perlindungan insurans terpakai.

Diputuskan:

(1) Kem Syed Sirajuddin, sebagai sebuah kem tentera, adalah kawasan larangan dan oleh itu tidak memenuhi kriteria 'akses awam' yang termasuk dalam takrifan 'jalan' di bawah s 2 APJ yang dibaca bersama s 91(1)(b) APJ dan polisi. Atas alasan ini sahaja Saman 837 dan 917 boleh dibenarkan. Kemp Syed Sirajuddin juga tidak mempunyai ciri penting 'jalan' dalam pengertian s 2 APJ kerana ia tidak bersambung dari satu tempat ke tempat lain. Sebagai sebuah kem tentera, Kem Syed Sirajuddin mempunyai sempadan fizikal dan mana-mana jalan di dalamnya tidak boleh dikatakan menghubungkan dua atau lebih tempat yang boleh dilalui oleh orang awam. Dalam keadaan tersebut, Saman 837 dan 917

A dibenarkan (lihat perenggan 50, 51 & 52).]

Cases referred to

Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Company (M) Berhad [2015] MLJU 427; [2015] 9 CLJ 821, CA (refd)

B *Allianz General Insurance Company (M) Bhd v Vijindran a/l Kalaichelvan & Ors* [2017] MLJU 2177, HC (refd)

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 6 MLRA 224, FC (refd)

C *AmGeneral Insurance Bhd (juga dikenali sebagai Kurnia Insurans (M) Bhd) lwn Wakil Diri Kepada Harta Pusaka Amir Farris bin Ahmad, Simati dan satu lagi* [2019] MLJU 2097, HC (refd)

Chua Tian Chang v Pendakwa Raya [2016] MLJU 1267, HC (refd)

Cutter v Eagle Star Insurance Co Ltd; Clarke v Kato and others [1998] 4 All ER 417, HL (refd)

D *Gopal Nagaiah v Am General Insurance Berhad* [2015] 2 MLRH 191, HC (refd)

RHB Insurance Bhd v Twe Lai Poh & Ors (Originating Summons No WA-24NCC-610–04 of 2022) (unreported), HC (folld)

Thomas v Dando [1951] 2 KB 620 (refd)

E *Yap Weng Ken & Anor v Mohd Hero & Ors and another case* [2018] MLJU 109, HC (refd)

Legislation referred to

Road Traffic Act 1988 [UK] s 192

F Protected Areas And Protected Places Act 1959 s 4(2)

Road Transport Act 1987 ss 2, 91, 91(1), 91(1)(b), 96(1), (2), (3)

Raymond Sivasothey (Kenneth William & Assoc) in Civil Suit Nos WA-24NCC-837–08 of 2022 and WA-24NCC-917–09 of 2022 for the

G *plaintiffs.*

Shamila (Sandu & Assoc) in Civil Suit No WA-24NCC-837–08 of 2022 for the first defendant.

Shamila (Sandu & Assoc) in Civil Suit No WA-24NCC-917–09 of 2022 for the third defendant.

H *Ellen Cheran (V Gobi & Assoc) in Civil Suit No WA-24NCC-837–08 of 2022 for the second defendant.*

Ellen Cheran (V Gobi & Assoc) in Civil Suit No WA-24NCC-917–09 of 2022 for the first and second defendants.

I **Wan Muhammad Amin J:**

[1] The plaintiffs in both the above suits (Originating Summons No WA-24NCC-837–08 of 2022 ('Suit 837') and Originating Summons No WA-24NCC-917–09 of 2022 ('Suit 917') (collectively referred to as 'the

suits') had applied for a declaration in respect of the enforceability of two insurance policies under s 96(3) of the Road Transport Act 1987 ('the RTA'). A

[2] Both suits share the following commonalities:

(a) they involve the same accident and similar parties but are in respect of different insurance policies; B

(b) the plaintiffs are represented by the same solicitors, the first defendant (in Suit 837) and third defendant (in Suit 917) are represented by the same solicitors and the second defendant (in Suit 837) and the first and second defendants (in Suit 917) are represented by the same solicitors; and C

(c) the primarily issue in both suits is whether the accident occurred on a 'road' (or 'public road') as defined by the RTA as required under the respective policies for the insurance coverage to apply. D

[3] Both suits were heard together and the submissions were mainly by learned counsel for the plaintiffs and learned counsel for Rauf Saifuddin bin Jantan ('Rauf') and Nor Hasimah bt Zainal Abidin ('Nor Hasimah'). Counsel for Lailin Sinin ('Lailin') substantially adopted the submissions of counsel for Rauf and Nor Hasimah. E

[4] After hearing submissions from all parties, I dismissed both suits, below are the reasons for my decision. F

SALIENT BACKGROUND FACTS

[5] The plaintiff in Suit 837 issued a motor insurance policy No 242000057272-00 ('Policy 272') in respect of a motorcycle bearing registration No SYJ 7432 ('motorcycle SYJ 7432') to Ronny Emanuel Rabinus (deceased) ('Ronny') (substituted by the administrator of his estate, his mother, Lailin Sinin). G

[6] The plaintiff in Suit 917 issued a motor insurance policy No 502050028112-00 ('Policy 112') in respect of a motorcycle bearing registration No CCP 7912 ('motorcycle CCP 7912') to Nor Hasimah. H

[7] An accident occurred on 6 April 2021 at around 11:30am at Jalan Utama, Kem Syed Sirajuddin, Gemas, Negeri Sembilan ('Kem Syed Sirajuddin') involving motorcycle SYJ 7432 ridden by Ronny and motorcycle CCP 7912 which was ridden by Rauf ('the accident'). I

[8] It is not disputed that Kem Syed Sirajudin is a military or army camp.

[9] A s 96(2) of the RTA notice was subsequently issued by Lailin's solicitors to the plaintiff in Suit 837 and similarly a s 96(2) of the RTA notice was issued by Rauf's solicitors to the plaintiff in Suit 917.

[10] Rauf commenced a suit against Ronny's estate on 26 January 2022 while Lailin, as the administrator of Roney's estate, initiated a suit against Rauf and Nor Hasimah on 1 July 2022 ('accident suits'). Both the accident suits were filed at the Kuala Pilah Sessions Court.

[11] An investigation was then carried out by the plaintiffs' appointed adjustors and following the said investigation, the plaintiffs' concluded that as the accident occurred in Kem Syed Sirajuddin, Gemas, an army camp area, it is thus not a public road or a road to which the public has access as stipulated under ss 2 and 91(1)(b) of the RTA.

[12] Therefore, the polices issued by the plaintiffs did not cover the accident.

COVERAGE UNDER THE POLICIES

[13] Both Policy 272 and Policy 112 have similar if not almost identical wordings. The relevant clauses in Policy 272 are reproduced below:

Policy 272

Section A: Loss or Damage to Your Own Motorcycle

Clause 1a: Events We Cover

We will indemnify You if Your Motorcycle is lost or damaged during the Period of Insurance arising from the following Incidents:

(i) accidental collision or overturning;

(ii) collision or overturning caused by mechanical breakdown;

(iii) collision or overturning caused by wear and tear;

(iv) impact damage caused by falling objects provided no convulsions of nature is involved;

(v) fire, explosion or lightning;

(vi) burglary, housebreaking or theft;

(vii) malicious act; or

(viii) while in transit i.e. being carried from one place to another (including during loading and unloading) of Your Motorcycle by:

a. *Road*

b. rail;

c. inland waterway i.e. across a river or canal etc.; or

d. across the sea by ferry or ship or any sea faring vessels etc. between the island of Penang and the mainland only.'

Section B: Liability to Third Parties

Clause 1a: What is Covered?

I/We will indemnify You and / or Your Authorised Rider for the amount which You and / or Your Authorised Rider are legally liable to pay any third party (including third party's costs and expenses) for:

(i) death or bodily injury to any person except those specifically excluded under this Policy; and/or

(ii) damage to property except those specifically excluded under this Policy as a result of an Incident arising out of the *use* of Your Motorcycle *on a Road*. This cover is extended to Your Authorised Rider provided Your Authorised Rider also complies with all the terms and conditions of this Policy.'

Section F: Definitions of words highlighted in the Policy

In this *Policy, Schedule* and *Certificate of Insurance*, unless the context otherwise requires, the following words shall have the meanings as defined below.

...

22. Road

Section 2 of the Road Transport Act 1987 defines *'Road'* as *'any public road and any other road to which the public has access* and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round- abouts, traffic islands, road dividers, all traffic lanes, sidetables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use. (Emphasis added.)

[14] Policy 112 is almost identical in its wording with Policy 272 except reference to 'Period of Insurance' in Section A cl 1(a) is referred to as 'Period of Takaful' in Policy 112 and reference to 'Policy' in Policy 272 is referred to as 'Certificate' in Policy 112. The definition of 'Road' in Section F is identical in both Policy 272 and Policy 112.

[15] Therefore, based on the above clauses of the policies it is clear that insurance coverage is provided for an accident or 'Incident' that occurred arising from the use of the insured vehicles (the motorcycles) on a road.

[16] Hence the issue is whether Kem Syed Sirajuddin constitutes a 'road' within the definition of s 2 of the RTA which definition is adopted in the policies.

A WHETHER THE ACCIDENT OCCURRED ON A 'ROAD' AS DEFINED BY THE RTA AND THE POLICIES

[17] 'Road' under the policies applies the definition in s 2 of the RTA which provides as follows:

B

'road' means —

(a) any *public road* and other road to which *the public has acces*s and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, roundabouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration C lanes, side-tables, media strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas and other structures and fixtures to fully effect its use;

(b) for the purposes of sessions 70 and 85, also includes a road under construction; and

D

(c) for the purpose of sections 41, 42, 43, 44, 45, and 45A, also includes a parking place. (Emphasis added.)

[18] The term 'use' under s 2 of the RTA is defined as follows:

E 'use' means *use on any road'.* (Emphasis added.)

[19] The requirements that must be fulfilled for an insurance policy to be issued is found in s 91(1) of the RTA which provides as follows:

F 91 Requirements in respect of policies.

In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

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(b) *insures such person*, or class of persons as may be specified in the policy *in respect of any liability* which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the *use of the motor vehicle* or land implement drawn thereby *on a road:* (Emphasis added.)

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[20] What this means is that it is a specific requirement under s 91 of the RTA that the insurance policy that is issued has to cover the insured in respect of liability which is 'caused by or arising out of the use of' the insured I vehicle 'on a road' (see the *Law of Motor Insurance* by S Santhana Dass at para 2.8).

[21] Hence, the two essential elements in the policies for coverage of the liability are:

(a) it has to be in respect of accidents that occur out of the *use* of the insured vehicles; and

(b) it has to occur on a 'road'.

[22] That being the case the main issue here is whether Kem Syed Sirajuddin falls under the definition of 'road' under the policies read together with s 2 of the RTA.

[23] In this regard there are several cases which have dealt with the definition of 'road' in s 2 of the RTA and under insurance policies.

[24] Learned counsel for the plaintiffs submitted on the physical characteristics of a 'road' and cited the following cases:

(a) *Cutter v Eagle Star Insurance Co Ltd; Clarke v Kato and others* [1998] 4 All ER 417 where the English House of Lords dealt with the definition of a road under the English Road Traffic Act 1988 and held, inter alia, as follows:

> The word 'road' is defined in s 192 of the Act. For England and Wales it means *'any highway and any other road to which the public has access'.*
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> ...
>
> It is important to observe that the consideration of access by the public only arises if the place is a road. It may well be that the public has access to it but that is not enough. As was recognised in *Griffin v Squires* [1958] 3 All ER 468; [1958] 1 WLR 1106 *it has also to be a road.* In *Oxford v Austin* [1981] RTR 416 at 418 Kilner Brown J referred to a road as *'a definable way between two points over which vehicles could pass'.* I would hesitate to formulate a comprehensive definition whereby a place maybe identified as a road, but some guidance should be found by considering *its physical character and the function which it exists to serve.*
>
> ...
>
> But it is also necessary to consider the function of the place in order to see if it qualifies as a road. *Essentially a road serves as a means of access.* It leads from one place to another and constitutes a route whereby travellers may move conveniently between the places to which and from which it leads. It is thus a defined or at least a definable way *intended to enable those who pass over it to reach a destination.* Its precise extent will require to be a matter of detailed. (Emphasis added.)

(b) *Thomas v Dando* [1951] 2 KB 620 in which the House of Lords held as follows:

> All that the court decided in *Bugge v Taylor* (2) was that there was evidence on which the justices could find that the forecourt was a road. It was not laid

down that every court was bound to find that a place is a road merely because it is not separated by a wall or rail from the pavement. It would be impossible to hold that this little piece of land, which was only used by the customers of the shop, is a road. The magistrate heard the evidence and came to the conclusion that this was a piece of *private property which the public did not habitually use at* they used the forecourt in Bugge v Taylor (2). Therefore I think that he was entitled to find that it was not a public highway. (Emphasis added.)

(c) *AmGeneral Insurance Bhd (juga dikenali sebagai Kurnia Insurans (M) Bhd) lwn Wakil Diri Kepada Harta Pusaka Amir Farris bin Ahmad, Simati dan satu lagi* [2019] MLJU 2097 where the High Court held:

> [17] Berdasarkan kedua-dua kes yang dirujuk di atas, dapatlah difahami bahawa *sebuah 'jalan' mestilah menghubunqkan 2 titik iaitu dari titik A ke titik B dan orang awam hendaklah mempunyai akses (tiada sekatan) untuk bergerak dari satu titik ke satu laqi titik yang lain tersebut.* (Emphasis added.)

[25] I do not find it necessary to address the above cases specifically in so far as they pertain to the physical characteristics of a road because this was not made an issue by the parties.

[26] Further, there were no arguments raised on whether Kem Syed Sirajuddin has the physical characteristics of a road.

[27] The issue in these suits is that the accident occurred in Kem Syed Sirajuddin which is an army camp and as such it is not a *public road* or a road which the *public has access to*. In connection with this, learned counsel for the plaintiffs cited the following cases:

(a) *Yap Weng Ken & Anor v Mohd Hero & Ors and another case* [2018] MLJU 109 where the High Court held that a highway which was not yet opened for public use is not a 'road' within the meaning under s 2 of the RTA. The High Court held as follows:

> [24] The accident happened on 10 April 2014, a few days *before the Highway was declared a Federal Road and opened to the public.* Accordingly, at the time of the accident the Highway was not a road pursuant to s 2 of the RTA.
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> [25] Based on the above, I disagree with the learned SCJ's finding of law that the Highway was a road at the time of the accident. This court finds that the Highway was not a 'road' pursuant to s 2 of the RTA. (Emphasis added.)

(b) *AmGeneral Insurance* in which the High Court held that the accident had occurred on a road which had an obstruction or 'sekatan' which means the road does not satisfy the criteria of a 'road'. The High Court also held that as the road in question was a *private road* and not open to the public it does not fall within the definition of 'road' under s 2 of the RTA. This

can be seen from the following passages of the case:

> [22] Tempat kemalangan tersebut sememangnya tidak memenuhi sifat *'definable way between two points over vehicle could pass'* kerana ia tidak dapat menghubungkan dua titik dengan kewujudan bongkah *batu yang merintangi atau menyekat seluruh jalan tersebut'*.
>
> ...
>
> [24] Sehubungan dengan kedudukan di atas, dengan merujuk kepada takrifan 'jalan' di bawah s 2 Akta 333, saya berpendapat bahawa jalan yang dipertikaikan di dalam Saman Pemula ini merupakan *jalan persendirian* dan jalan ini *belum dibuka untuk kegunaan atau akses orang awam* serta *tidak terjumlah kepada 'jalan' di bawah s 2 Akta 333 tersebut* (rujuk kes *Multi-Purpose Insurance Bhd v Windsor Aims Sdn Bhd & Satu Lagi* [2012] 9 CLJ 607 *dan kes Yap Weng Ken & Anor v Mohd Hero & Others* [2018] 1 LNS 139). (Emphasis added.)

(c) *RHB Insurance Bhd v Twe Lai Poh & Ors* (Originating Summons No WA-24NCC-610–04 of 2022) (unreported), a decision by Justice Ong Chee Kwan whose decision was upheld by the Court of Appeal. In this case Justice Ong dealt with issues which are similar to the issues in the present suits. Further, the plaintiff's counsel in *RHB Insurance* also represents the plaintiffs herein. In *RHB Insurance* the accident occurred on a construction site known as Tapak Pembinaan Gamuda Paya Indah, Sepang, Selangor and the issue was whether the construction site falls under the definition of 'road' under Section 2 RTA. Justice Ong held that it did not and this can be seen from, inter alia, the following passages in his grounds of judgment:

> [20] Based on above authorities, it is clear that for a place to qualify as a 'road', it must fulfill the following criteria:
>
> (i) has a *physical character* of a defined or definable route;
>
> (ii) it is *used as a means of access and open to the general public*; and
>
> (iii) it *connects from one place to another*.
>
> [21] Applying the aforesaid criteria, it is apparent that the Tapak Pembinaan Gamuda which was a gated construction site as seen in the photographs at pp 99–100 of the plaintiff's affidavit in support, simply do not meet such criteria. It does not have the physical character of a road, it is not accessible or open to the general public as a mean of access and the general public do not drive or travel along the construction site to get from one place to another. (Emphasis added.)

[28] Applying the three criteria mentioned in *RHB Insurance* to the facts of the present suits, I find that two out of the three criteria have *not* been met in that Kem Syed Sirajuddin:

(a) was not open to the public or to which the public has access; and

(b) does not, arguably, connect from one place to another.

Public road and any other road to which the public has access

[29] On the issue of public road and access to the public, it is clear to me and neither was it disputed that the 'public' does not have access to Kem Syed Sirajuddin.

[30] That being the case Kem Syed Sirajuddin does not fall within the definition of 'road' under s 2 of the RTA and the policies.

[31] I find support for this in, inter alia, the earlier-mentioned cases where in those respective cases it was held that the following do *not* constitute a 'road' under s 2 of the RTA:

(a) a highway which was *not yet declared a Federal Road* and opened to the public (*Yap Weng Ken*);

(b) a road with an *obstruction* or 'sekatan' which is not open to public (*AmGeneral Insurance*); and

(c) a *gated construction site* (*RHB Insurance*)).

[32] While I acknowledge that none of the above cases involve an *army camp*, however, what can be discerned from them is that for a road to fall within the definition of s 2 of the RTA it must have *unrestricted access* to the public, and this appears to be a salient feature of a 'public road'.

[33] Kem Syed Sirajuddin would reasonably fall within the 'protected areas' or 'protected places' under the Protected Areas And Protected Places Act 1959 and this means that the said army camp is restricted to the public. Section 4(2) of the said Act makes unauthorised entry a strict liability offence (*Chua Tian Chang v Pendakwa Raya* [2016] MLJU 1267).

[34] Concerning this issue, some clarity can be found from the case of *Cutter* where the House of Lords examined the 'public access' element in the definition of 'road' under s 192 of the English Road Traffic Act 1988 which wording is similar with the definition of 'road' under s 2 of the RTA. It was held, inter alia, as follows:

> The word 'road' is defined in s 192 of the Act. For England and Wales it means *'any highway and any other road to which the public has access'.*
>
> ...
>
> ... The first is that the element of *public access* has to be *tested by reference to facts as*

well as rights. The question in this context is *whether the public actually and legally have access*. As the Lord Justice-General (Clyde) observed in *Harrison v Hill* 1932 JC 13 at 16: A

> There must be, as a matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed — that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. B

Lord Sands (at 17) observed in the same case:

> ... any road may be regarded as a road to which the public have access upon which members of the public are to be found who have *not* obtained access either by overcoming a *physical obstruction* or in defiance of *prohibition express or implied.* C

Secondly, *the public in this context means the general public*. To quote again from the opinion of the Lord Justice-General in *Harrison v Hill* (at 16): D

> I think that, when the statute speaks of *'the public'* in this connexion, *what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes* to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. (Emphasis added.) E

[35] *Cutter* reinforces the point that being a restricted area, Kem Syed Sirajuddin is not accessible to the general public. Hence, Kem Syed Sirajuddin does not fall within s 2 of the RTA and the policies, as it does not fulfil the 'public road' and 'public access' element of the said Section. F

Connects from one place to another

[36] I am additionally of the view that Kem Syed Sirajuddin does not fulfil the criteria of a road which connects one place to another. G

[37] While there are no specific submissions on this and the physical aspect of Kem Syed Sirajuddin was not address specifically, however, given that Kem Syed Sirajuddin is an army camp it cannot be said to connect from one place to another. This is because, as an army camp, Kemp Syed Sirajuddin is situated within a confined area, is positioned within a specific restricted geographical space and would have physical boundaries. H

[38] Thus, it does not have a characteristic of a 'road' in terms of connecting one place to another. I

A THE DEFENDANTS' ARGUMENTS

[39] Learned counsel for the defendants submitted that the meaning of 'road' under s 2 of the RTA and s 91(1)(b) of the RTA should not be read restrictively and cited the case of *Gopal Nagaiah v Am General Insurance Berhad* [2015] 2 MLRH 191. This was a case where in dismissing the plaintiff's claim the Sessions Court held that the road being situated in an estate was not a 'road' within the meaning of s 2 of the RTA. The decision of the Sessions Court was reversed by the High Court.

[40] In *RHB Insurance*, Justice Ong had also dealt with similar submissions pertaining to the *Gopal Nagaiah* case, as was raised by learned counsel for the defendants' in this suits. In short Justice Ong distinguished *Gopal Nagaiah* and held, inter alia, as follows:

> [29] So, even according to Justice Lee Swee Seng i*n Gopal Nagaiah v Am General Insurance Bhd*, it is necessary that the use of the motor vehicle is on a road that the public can have access. This is quite apart from the fact that in *Gopal Nagaiah v Am General Insurance Bhd*, Justice Lee Swee Seng was dealing with a recovery action against the insurer which means that the plaintiff had already secured judgment against the insured before the session court without the insurer obtaining the declaration under s 96(3) of the RTA. (Emphasis added.)

[41] I hold a similar view as Justice Ong on this issue and would further add that in *Gopal Nagaiah* Justice Lee Swee Seng (as he then was) had specifically held as follows:

> [32] I would thus conclude that the meaning of 'road' when used in the context of the meaning of 'motor vehicle' as well as in 'arising out of the use of motor vehicles' which 'use is on any road' in the preamble to the RTA and in s 91(1)(b) of the RTA does not require one to read it restrictively to exclude accidents that happen on private roads that are maintained and kept by private persons or private bodies for *so long as the public has access to it.* (Emphasis added.)

[42] *Gopal Nagaiah* was decided on its own set of facts which are separate to the present suits and in any event Justice Lee had made it clear that the 'public access' element still needs to be fulfilled.

[43] Learned counsel for the defendants (representing Rauf and Nor Hasimah) also argued that:

(a) the policies were in force at the time of the accident;

(b) the plaintiffs ought to have known that the accident could occur in the army camp, Kem Syed Sirajuddin, as Ronny was a military personnel residing in the said camp; and

(c) it is mandatory for the plaintiffs to indemnify third parties regardless of whether Kem Syed Sirajuddin was a private or public road (ie notwithstanding whether it falls within the definition of 'road' under s 2 of the RTA).

[44] Learned counsel for the defendants cited the Federal Court case of *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 6 MLRA 224 to support his above arguments.

[45] With respect to learned counsel for the defendants, *Sa' Amran* is not authority that makes it mandatory for the insurer to provide insurance coverage to third parties in *all* situations. If that were the case then it would render the provision of s 96(3) of the RTA redundant.

[46] Further the circumstances for which the plaintiffs herein sought for the declarations were not raised or decided in *Sa' Amran*.

[47] Whilst I sympathise with the victims of the accident, I cannot ignore the provisions of the law. In this regard, I can do no better than to quote a passage from *Cutter* where the House of Lords held as follows:

> One cannot but feel sympathy for the unfortunate victims of these two accidents, but it must be for the legislature to decide as matter of policy whether a remedy should be provided in such cases as these, and more particularly it must be for the legislature to decide, if an alteration of the law is to be made, precisely how that alteration ought to be achieved.

COMPLIANCE WITH S 96(3) OF THE RTA

[48] The declarations sought by the plaintiffs are governed by s 96(3) of the RTA. Sections 96(1), (2) and (3) of the RTA are reproduced below:

> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer *may be entitled to avoid or cancel, or may have avoided or cancelled the policy*, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
>
> (2) *No sum shall be payable* by an insurer *under subsection (1)*
>
> (a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either-

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) *No sum shall be payable* by an insurer *under subsection (1)* if *before the date the liability was incurred*, the insurer had obtained a declaration *from a court that* the insurance was void or unenforceable*:*

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within *seven days after the commencement of that action*, he has given *notice thereof to the person who is the plaintiff* in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

[49] In so far as the provisos to s 96(3) of the RTA are concerned, they have been complied with in that the defendants have been notified of the suits and in addition, have been made parties to the suits. Further, no judgment has been obtained in the accident suits at the time this application was decided (*Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Company (M) Berhad* [2015] MLJU 427; [2015] 9 CLJ 821; *Allianz General Insurance Company (M) Bhd v Vijindran a/l Kalaichelvan & Ors* [2017] MLJU 2177).

CONCLUSION

Kem Syed Sirajuddin, being an army camp, is a restricted area and as such does not fulfil the 'public access' criteria to fall within the definition of 'road' under the s 2 RTA read together with s 91(1)(b) of the RTA and the policies. On this ground alone suits 837 and 917 can be allowed.

However, I also find that Kemp Syed Sirajuddin lacks the essential characteristic of a 'road' within the meaning of s 2 of the RTA as it does not connect from one place to another. As an army camp, Kem Syed Sirajuddin would have physical boundaries and any road within it cannot be said to connect two or more places which the general public would have access to.

For the reasons stated above, I allowed prayers 1, 3 and 4 of both Suit 837 and Suit 917 with no order as to costs.

Order accordingly.

Reported by K Selvaraju